

Attorney or Party Name, Address, Telephone & FAX Numbers, and California State Bar Number David B. Golubchik (SBN 169844) Levene, Neale, Bender, Rankin & Brill L.L.P. 10250 Constellation Blvd., Suite 1700 Los Angeles, CA 90067 (310) 229-1234 Attorneys for Debtor and Debtor in Possession	FOR COURT USE ONLY <div style="border: 1px solid black; padding: 5px; text-align: center;"> FILED SEP 29 2006 CLERK U.S. BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA Deputy Clerk </div>
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA	CASE NO.: RS 05-16335-DN <p style="text-align: center;">Chapter 11</p>
In re: DURA ART STONE, INC., a California corporation, <p style="text-align: right;">Debtor(s).</p>	

NOTICE OF SALE OF ESTATE PROPERTY

Sale Date: 10/27/06	Time: 9:00 a.m.
Location: Ctrm: 304, 3420 Twelfth Street, Riverside, California	

Type of Sale: ☒ Public ☐ Private Last date to file objections: 10/13/06

Description of Property to be Sold: Personal property consisting of more than 1,000 molds for the Debtor's products,
as well as certain miscellaneous equipment (collectively, the "Assets").

Terms and Conditions of Sale: as is, where is, with no representations or warranties.

Assets located in City of Morrow, Georgia. Sale does not include any intellectual property rights with respect to the Assets.

Purchaser must take possession and remove Assets from existing location within 10 days of entry of order approving sale.

Proposed Sale Price: \$25,000

Overbid Procedure (If Any): Initial overbid and all subsequent bids should be made in increments of at least \$5,000. Interested parties must deposit \$25,000.00 with counsel for the Debtor no later than 14 days before the hearing.

If property is to be sold free and clear of liens or other interests, list date, time and location of hearing:

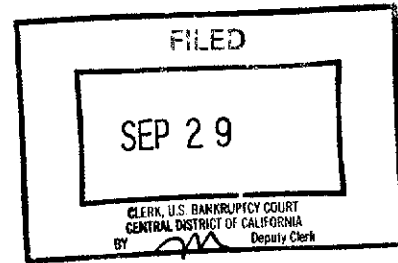
Date: October 27, 2006; Time: 9:00 a.m.; Place: Courtroom 304, 3420 Twelfth Street, Riverside, California

Contact Person for Potential Bidders (include name, address, telephone, fax and/or e-mail address):

David B. Golubchik
 Levene, Neale, Bender, Rankin & Brill L.L.P.
 10250 Constellation Blvd., Suite 1700
 Los Angeles, CA 90067
 (310) 229-1234 phone; (310) 229-1244 fax; dbg@lnbrb.com

Date: 9/27/06

1 DAVID B. GOLUBCHIK (SBN 185520)
2 TODD M. ARNOLD (SBN 221868)
3 LEVENE, NEALE, BENDER, RANKIN & BRILL L.L.P.
4 10250 Constellation Blvd., Suite 1700
5 Los Angeles, California 90067
Telephone: (310) 229-1234
Facsimile: (310) 229-1244



6 Attorneys for Debtor
7 and Debtor in Possession

8
9 UNITED STATES BANKRUPTCY COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 RIVERSIDE DIVISION
12

13
14 In re

15 DURA ART STONE, INC., a California
16 corporation,

17 Debtor and
18 Debtor in Possession.

19) CASE NO. RS 05-16335-DN
20)
21) Chapter 11
22)
23) NOTICE OF MOTION AND MOTION
24) TO SELL CERTAIN PERSONAL
25) PROPERTY ASSETS OUTSIDE THE
26) ORDINARY COURSE OF BUSINESS;
27) MEMORANDUM OF POINTS AND
28) AUTHORITIES; DECLARATION OF
THOMAS D. SEIFERT IN SUPPORT
THEREOF

DATE: October 27, 2006
TIME: 9:00 a.m.
PLACE: Courtroom "304"
3420 Twelfth Street
Riverside, CA

25 ///

26 ///

27 ///

TABLE OF CONTENTS

	Page
MEMORANDUM OF POINTS AND AUTHORITIES.....	6
I. STATEMENT OF FACTS.....	6
A. Background and Business Operations.....	6
B. Debtor's Financial Constraints.....	7
C. The Assets.....	7
D. Proposed Auction Procedure.....	8
E. Secured Claims.....	9
F. The Debtor Believes That the Sale is in the Best Interest of the Estate and Should Be Approved.....	10
G. Compliance with Notice Requirements.....	10
II. DISCUSSION.....	11
A. The Court Should Authorize The Debtor To Sell The Assets Free and Clear of All Liens, Encumbrances and Interests.....	11
1. The Debtor Has Complied with All Requirements Under the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, and Local Bankruptcy Rules Governing the Sale of the Property.....	11
2. The Sale Should Be Approved Because Good Business Reasons Exits to Grant the Motion, the Purchased Price is Fair and Reasonable, and the Sale is in the Best Interests of the Creditors and the Estate.....	13
a. Sound Business Purpose.....	13
b. Fair and Reasonable Price.....	14
c. Adequate Marketing.....	15
d. Good Faith.....	15
e. Accurate and Reasonable Notice.....	16
3. The Sale of the Property Free and Clear of Liens is Proper Under 11 U.S.C. §363(f)	16
a. The Requirement of Section 363(b)(2) Has Been Satisfied.....	17
b. The Requirement of Section 363(b)(3) Has Been Satisfied.....	17
c. The Requirement of Section 363(b)(5) Has Been Satisfied.....	21
III. CONCLUSION.....	23

Cases

<u>In re Alpha Industries, Inc.,</u> 84 B.R. 703 (Bankr.Mont. 1988).....	14
<u>In re Alpine Group,</u> 151 B.R. 931 (9th Cir. BAP 1993)	20
<u>Associates Commercial Corp. v. Rash,</u> 520 U.S. 953, 138 L.Ed.2d 148, 117 S.Ct. 1879, 1883 (1997).....	20
<u>In re Beker Industries Corp.,</u> 63 B.R. 474 (Bankr. S.D.N.Y. 1986).....	18, 19, 20
<u>Big Shanty Land Corp. v. Comer Properties, Inc.,</u> 61 B.R. 272 (Bankr.N.D.Ga. 1985).....	14
<u>In re Canyon Partnership,</u> 55 B.R. 520 (Bankr. S.D. Cal. 1985).....	14
<u>In re Chung King, Inc.,</u> 753 F.2d 547 (7 th Cir. 1985).....	14
<u>In re Collins,</u> 180 B.R. 447 (Bankr. E.D. Va. 1995)	18
<u>Folger Adam Security, Inc. v. Dematteis/MacGregor, JV,</u> 209 F.3d 252, 259 (3 rd Cir. 2000).....	21
<u>Ford Motor Credit v. Dobbins,</u> 35 F.3d 860 (4th Cir. 1994).....	20
<u>In re Grand Slam U.S.A., Inc.,</u> 178 B.R. 460 (E.D.Mich. 1995)	21, 22
<u>In re Gulf States Steel, Inc. of Alabama,</u> 285 B.R. 497 (Bankr.N.D.Ala. 2002).....	22
<u>In re Hatfield Homes, Inc.,</u> 30 B.R. 353 (Bankr. E.D. Pa. 1983)	18
<u>Healthco International, Inc.,</u> 174 B.R. 174 (Bankr.D.Mass. 1994)	21
<u>In re Heine,</u> 141 B.R. 185 (Bankr. D.S.D. 1992)	17

Case (cont.)

In re Karpe,

84 B.R. 926 (Bankr. M.D.Pa. 1988).....16

In re Kenneth M. Wing,

63 B.R. 83 (Bankr.M.D.Fla. 1986).....22

King v. Board of Supervisors of Fairfax County (In re A.G. Van Metre, Jr., Inc.),

155 B.R. 118 (Bankr.E.D.Va. 1993)22

In re The Landing,

156 B.R. 246 (Bankr.E.D.Mo. 1993).....13

In re Lionel Corp.,

722 F.2d 1063 (2d Cir. 1983)13

In re Oneida

114 B.R. 352, 357 (Bankr. N.D.N.Y. 1990)20

In re Stroud Wholesale, Inc.,

47 B.R. 999 (E.D.N.C. 1985)21

In re Mama's Original Foods, Inc.,

234 B.R. 500 (C.D.Cal. 1999, J. Bufford).....13

In re Milford Group, Inc.,

150 B.R. 904 (Bankr. M.D. Pa. 1992).....18

Riverside Inv. Partnership,

674 F.2d 634 (7th Cir. 1982)(case under the Bankruptcy Act)17

Matter of Rouse,

54 B.R. 31 (Bankr.W.D.Mo.1985)18

In re Terrace Chalet Apts.,

159 B.R. 821 (N.D. Ill. 1993).....17

In re Terrace Gardens Park Partnership,

96 B.R. 707 (Bankr. W.D. Tex. 1989).....18, 19

United Savings Assoc. of Texas v. Timbers of Inwood Forest Assocs.,

484 U.S. 365, 108 S.Ct. 626, 630, 98 L.Ed.2d 740 (1988).....18

Walter v. Sunwest Bank (In re Walter),

83 B.R. 14 (9th Cir. B.A.P. 1988)13

Case (cont.)

In re WBQ Partnership,

189 B.R. 97 (Bankr.E.D.Va. 1995)21

In re Wilde Horse Enterprises, Inc.,

136 B.R. 830 (Bankr.C.D.Cal. 1991)13, 14, 16

Statutes

11 U.S.C. § 1016

11 U.S.C. § 102(1).....11

11 U.S.C. § 10522

11 U.S.C. § 3632, 4, 19

11 U.S.C. § 363(1).....18

11 U.S.C. § 363(2).....18

11 U.S.C. § 363(b).....13, 14

11 U.S.C. § 363(b)(1)11, 15

11 U.S.C. § 363(b)(2)11, 17

11 U.S.C. § 363(b)(5)21

11 U.S.C. § 363(e).....18

11 U.S.C. § 363(f)17, 18, 19, 23

11 U.S.C. § 363(f)(1).....16, 17

11 U.S.C. § 363(f)(2).....17, 23

11 U.S.C. § 363(f)(3).....17, 18, 19, 23

11 U.S.C. § 363(f)(5).....22, 23

11 U.S.C. § 363(k).....19

11 U.S.C. § 506(a)18, 19, 20, 21, 22

11 U.S.C. § 506(d).....22

11 U.S.C. § 70512

11 U.S.C. § 724(b).....21, 22

11 U.S.C. § 11076

11 U.S.C. § 11086

11 U.S.C. § 112915

11 U.S.C. § 1129(b)(2)(A).....21, 22

Rules

Fed. Bk. Rule P. 2002.....	12
Fed. Rule Bk. P. 2002(a)(2).....	11
Fed. Rule Bk. P. 2002(c)(1).....	11
Fed. Rule Bk. P. 2002(c)(1)(I).....	11
Fed. Rule Bk. P. 2002(I).....	12
Fed. Rule Bk. P. 2002(k).....	11, 12
Fed. Rule Bk. P. 6004(a).....	11
Fed. Rule Bk. P. 6004(c).....	12, 13
Local Bankruptcy Rule 6004-2.....	12
Local Bankruptcy Rule 9013-1(a)(7).....	5
Local Bankruptcy Rule 9013-1(a)(11).....	5
Local Bankruptcy Rule 9013-1(1)(f).....	12
Local Bankruptcy Rule 9014.....	12

Treatises

4 L. King, <u>Collier on Bankruptcy</u> , ¶ 506.03[6][b] at 506-40.....	20
---	----

1 **TO THE HONORABLE DAVID NAUGLE, UNITED STATES BANKRUPTCY**
2 **JUDGE, OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND ITS COUNSEL,**
3 **OFFICE OF THE UNITED STATES TRUSTEE, AND PARTIES WHO HAVE**
4 **REQUESTED SPECIAL NOTICE:**

5 **PLEASE TAKE NOTICE** that a hearing will be held on October 27, 2006 at 9:00 a.m.,
6 before the Honorable David N. Naugle, in his Courtroom "304," located at 3420 Twelfth Street,
7 Riverside, CA 92501, for the Court to consider the motion ("Motion") filed by Dura Art Stone,
8 Inc., a California corporation, the Chapter 11 debtor and debtor in possession herein (the
9 "Debtor"), to cell certain assets of the estate outside the ordinary course of business pursuant to 11
10 U.S.C. § 363.

11 The Debtor is engaged in the business of designing and manufacturing architectural precast
12 products including planters, bollards, trash receptacles, ash urns, treegrates, benches, tables, garden
13 furniture, fountains, ornamental fixtures and perimeter security. On the date of its bankruptcy
14 filing, the Debtor had a manufacturing facility in Fontana, California and City of Morrow,
15 Georgia.

16 By far, the Debtor's largest expenses in connection with its operations are labor-related
17 costs, and specifically, workers' compensation coverage. Prior to the bankruptcy filing, the Debtor
18 employed up to 100 personnel, including architects, engineers, designers, detailers, manufacturers
19 and administrative staff. In connection with the Debtor's efforts to reduce expenses, the Debtor
20 reduced its staff to a core group of approximately 30 personnel, each of which is integral to the
21 Debtor's ability to maintain its operations and continue generating revenue. Unfortunately, even
22 though the Debtor's labor force was reduced by over 30%, insurance and other labor-related costs
23 almost doubled during the same period. The Debtor contacted its insurance carriers to review the
24 records and conduct appropriate audits, but the response is that insurance costs continue to
25 escalate.
26
27
28

1 As a result of such costs, the Debtor was forced to cease its active operations in Georgia,
2 but is instead operating through an independent subcontractor. The Debtor determined that it was
3 not economically feasible to remove the personal property from Georgia and, effectively, intended
4 to abandon such property due to its minimal value. Such personal property consisting of more than
5 1,000 molds for the Debtor's products, as well as certain miscellaneous equipment (collectively,
6 the "Assets"). The Assets do not include any leasehold improvements made by the Debtor at the
7 Georgia premises. The Debtor has determined that the value of the Assets is minimal. In addition,
8 once the cost of relocation of such Assets is factored, the Assets have a negative value.
9

10 The Debtor and the Official Committee of Unsecured Creditors (the "Committee") have
11 engaged in extensive discussions to determine how best to administer this case, including the
12 Assets. Currently, the Assets remain on real property owned by Thomas Seifert and Eugene
13 Mariani ("Seifert/Mariani"), the principals of the Debtor. Although Seifert/Mariani have
14 cooperated with the estate and have been storing the Assets at no charge to the estate, they have
15 indicated that they are selling the real property and will be unable to store the Assets for much
16 longer.
17

18 The Debtor and Committee have determined that, rather than abandoning the Assets, an
19 attempt should be made to sell them for maximum value. Seifert/Mariani have agreed to submit an
20 initial bid in the amount of \$25,000 to purchase the Assets, subject to overbid. The intent is to
21 have an open auction in Court without any barriers to overbids, such as breakup fees and other
22 protections. The proposed terms of the auction sale are as follows:
23

- 24 1. The sale will include the physical Assets located in Georgia only.
- 25 2. The sale will not include any intellectual property of the Debtor.
- 26
- 27
- 28

3. Any party may overbid for the purchase of Assets at the time of the hearing on the Motion. However, any such overbid should be on substantially the same terms and conditions set forth herein.
4. In the event that a party wishes to overbid, the party should deposit with counsel for the Debtor \$25,000 not later than 14 calendar days before the date of the hearing, which shall be deemed to be a non-refundable deposit in the event that the bidder is the successful overbidder at the hearing.
5. The only condition precedent for the sale to the successful bidder to close would be for the Debtor to obtain an order from the Court approving the conveyance of the Assets free and clear of all liens, claims and interests. There shall be no other conditions or contingencies for the sale.
6. The Debtor suggests that the initial overbid be equal to at least \$5,000 and that all subsequent bids should be made in increments of at least \$5,000.
7. In the event that the successful bidder is a person or entity other than Seifert/Mariani, the successful bidder shall be responsible for removing all Assets from the existing location within 10 days from the entry of the Court's order approving the sale.

PLEASE TAKE FURTHER NOTICE that the Motion is based upon this Notice of Motion and Motion, 11 U.S.C. § 363, the attached Memorandum of Points and Authorities and Declaration of Thomas D. Seifert, the entire record of this case, the statements, arguments and representations of counsel to be made at the hearing on the Motion, and any other evidence properly presented to the Court at or prior to the hearing on the Motion.

1 **PLEASE TAKE FURTHER NOTICE** that, pursuant to Local Bankruptcy Rule 9013-
2
3 1(a)(7), objections to the Motion must be in writing and filed with the Clerk of the United States
4 Bankruptcy Court and served upon Levene, Neale, Bender, Rankin & Brill L.L.P. as counsel for
5 the Debtor, whose address is set forth at the upper, left-hand corner of the first page of this Notice,
6 not later than fourteen (14) days prior to the scheduled hearing date set forth above.

7 **PLEASE TAKE FURTHER NOTICE** that, pursuant to Local Bankruptcy Rule 9013-
8 1(a)(11), the failure to file and serve a timely opposition to the Motion may be deemed by the
9 Court to constitute consent to the Court's granting of the relief sought.

10 Dated: September 27 2006

DURA ART STONE, INC., a
California corporation

By


DAVID B. GOLUBCHIK
TODD M. ARNOLD

LEVENE, NEALE, BENDER, RANKIN
& BRILL L.L.P.

Attorneys for Debtor and
Debtor in Possession

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

A. Background and Business Operations

1. Dura Art Stone, Inc., a California corporation, the Chapter 11 debtor and debtor in possession herein (the "Debtor"), commenced its bankruptcy case by filing a voluntary petition under Chapter 11 of 11 U.S.C. § 101 et seq. (the "Bankruptcy Code") on June 21, 2005 (the "Petition Date"). The Debtor is operating its business and managing its financial affairs as a debtor in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

2. The Debtor is engaged in the business of designing and manufacturing architectural precast products including planters, bollards, trash receptacles, ash urns, treegrates, benches, tables, garden furniture, fountains, ornamental fixtures and perimeter security. The Debtor has a manufacturing facility in Fontana, California and Georgia. The Debtor also has administrative offices in Northern California.

3. For over 70 years, the Debtor has been an industry leader in the manufacture of cast stone and cast gypsum. From 1935, as Western Artificial Stone Company, then as Western Art Stone and now as Dura Art Stone, the Debtor has consistently been a pioneer in the development of improved materials, techniques and processes.

4. In addition to designing and manufacturing precast ornamental and site furnishings products, the Debtor was involved in the design and manufacture of precast building panels, which would be utilized in construction of buildings, many of which were hi-rises. Over time, construction-related costs, such as materials, insurance and equipment rentals increased while revenues remained relatively constant due to increased competition, resulting in substantially

1 lower profits for the Debtor. In its efforts to streamline operations, the Debtor scaled back its
2 panel business and ceased taking on new panel-related projects.

3
4 **B. Debtor's Financial Constraints**

5 5. By far, the Debtor's largest expenses in connection with its operations are labor-
6 related costs, and specifically, workers' compensation coverage. Prior to the bankruptcy filing, the
7 Debtor employed up to 100 personnel, including architects, engineers, designers, detailers,
8 manufacturers and administrative staff. In connection with the Debtor's efforts to reduce
9 expenses, the Debtor reduced its staff to a core group of approximately 30 personnel, each of
10 which is integral to the Debtor's ability to maintain its operations and continue generating revenue.
11 Unfortunately, even though the Debtor's labor force was reduced by over 30%, insurance costs
12 almost doubled during the same period. The Debtor contacted its insurance carriers to review the
13 records and conduct appropriate audits, but the response is that insurance costs continue to
14 escalate. By way of example, in October 2005, insurance costs comprised approximately 43% of
15 the Debtor's expenditures.
16

17 **C. The Assets**

18 6. As a result of such costs, the Debtor was forced to cease its active operations in
19 Georgia, but is instead operating through an independent subcontractor. The Debtor determined
20 that it was not economically feasible to remove the personal property from Georgia and,
21 effectively, intended to abandon such property due to its minimal value. Such personal property
22 consisting of more than 1,000 molds for the Debtor's products, as well as certain miscellaneous
23 equipment, which is identified in Exhibit "A" hereto (collectively, the "Assets"). The Assets do
24 not include any leasehold improvements made by the Debtor at the Georgia premises. The Debtor
25
26
27
28

1 has determined that the value of the Assets is minimal. In addition, once the cost of relocation of
2 such Assets is factored, the Assets have a negative value.

3 7. The Debtor and the Official Committee of Unsecured Creditors (the
4 “Committee”) have engaged in extensive discussions to determine how best to administer this
5 case, including the Assets. Currently, the Assets remain on real property owned by Thomas Seifert
6 and Eugene Mariani (“Seifert/Mariani”), the principals of the Debtor. Although Seifert/Mariani
7 have cooperated with the estate and have been storing the Assets at no charge to the estate, they
8 have indicated that they are selling the real property and will be unable to store the Assets for
9 much longer.

10
11 **D. Proposed Auction Procedure**

12 8. The Debtor and Committee have determined that, rather than abandoning the
13 Assets, an attempt should be made to sell them for maximum value. Seifert/Mariani have agreed
14 to submit an initial bid in the amount of \$25,000 to purchase the Assets, subject to overbid. The
15 intent is to have an open auction in Court without any barriers to overbids, such as breakup fees
16 and other protections. The proposed terms of the auction sale are as follows:

- 17
18 a. The sale will include the physical Assets located in Georgia only.
19 b. The sale will not include any intellectual property of the Debtor.
20 c. Any party may overbid for the purchase of Assets at the time of the hearing on
21 the Motion. However, any such overbid should be on substantially the same
22 terms and conditions set forth herein.
23 d. In the event that a party wishes to overbid, the party should deposit with counsel
24 for the Debtor \$25,000 not later than 14 calendar days before the date of the
25
26
27
28

1 hearing, which shall be deemed to be a non-refundable deposit in the event that
2 the bidder is the successful overbidder at the hearing.

3 e. The only condition precedent for the sale to the successful bidder to close would
4 be for the Debtor to obtain an order from the Court approving the conveyance of
5 the Assets free and clear of all liens, claims and interests. There shall be no other
6 conditions or contingencies for the sale.

7 f. The Debtor suggests that the initial overbid be equal to at least \$5,000 and that
8 all subsequent bids should be made in increments of at least \$5,000.

9 g. In the event that the successful bidder is a person or entity other than
10 Seifert/Mariani, the successful bidder shall be responsible for removing all
11 Assets from the existing location within 10 days from the entry of the Court's
12 order approving the sale.

13
14
15 **E. Secured Claims**

16 9. Fremont Bank ("Fremont") holds a first priority security interest in substantially
17 all of the Debtor's assets, including the subject Assets, to secure an obligation due and owing to
18 Fremont in the amount of approximately \$3.6 million.

19 10. In addition, the Clayton County Tax Commission ("County") filed a proof of
20 claim wherein the County asserts a secured claim in the amount of \$91,062.15 based on alleged
21 personal property taxes. Such taxes are based on a percentage of value of the Debtor's assets.
22 Based on the fact that the Debtor believes that the value of its personal property assets in Georgia
23 is minimal, the Debtor disputes the secured claim and intends to file an objection thereto. In
24 addition, the claim is based not only on the Assets which are the subject of the proposed sale, but
25 also leasehold improvements and other assets which are not part of this sale.
26
27
28

1 **F. The Debtor believes that the sale is in the best interest of the estate and should be**
2 **approved.**

3 11. As discussed above, the Assets are of minimal value and the Debtor believes that
4 it does not make economic sense to relocate the Assets because the cost of relocation of more than
5 1,000 molds and miscellaneous equipment would outweigh its value. The proposed auction sale
6 appears to be the best way of maximizing the value of otherwise valueless assets. Seifert/Mariani
7 have agreed to submit an opening bid without any contingencies and without any obstacles to
8 overbid, which is consistent with the Debtor's goal to maximize the value of the estate for the
9 benefit of all creditors.
10

11 12. The overbid opportunity, proposed by the Debtor and discussed below, will
12 ensure that the final purchase price offered at the hearing on Motion will be the highest and best
13 price that could have been obtained for the Assets, which, by definition, will dictate its fair market
14 value.
15

16 **G. Compliance with Notice Requirements**

17 13. The Debtor believes that it has complied with all of the notice requirements of the
18 Bankruptcy Code, the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules.
19 Notice of this Motion (the "Notice") and the overbid sale has been given to the United States
20 Trustee, the Committee, all creditors, and all parties in interest at least 24 days before the hearing
21 date. The Notice includes the time and place of the overbid sale and the time fixed for filing
22 objections. The Notice and Motion are being served upon the parties who have liens or interests in
23 the Assets, and the Debtor has filed the Notice and Form 6004-2 with the Clerk of the Bankruptcy
24 Court.
25

26 ///

27 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II.

DISCUSSION

A. **The Court Should Authorize The Debtor To Sell The Assets Free And Clear Of All Liens, Encumbrances And Interests.**

1. The Debtor Has Complied With All Requirements Under the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, and Local Bankruptcy Rules Governing the Sale of the Property.

Section 363(b)(1) of the Bankruptcy Code provides that the Debtor "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1).

Section 102(1) of the Bankruptcy Code defines "after notice and a hearing" as after such notice as is appropriate in the particular circumstances, and such opportunity for hearing as is appropriate in the particular circumstances.

Rule 6004(a) of the Federal Rules of Bankruptcy Procedure provides in pertinent part that notice of a proposed sale not in the ordinary course of business must be given pursuant to Rule 2002(a)(2), (c)(1)(I) and (k), and, if applicable, in accordance with section 363(b)(2) of the Bankruptcy Code.

Rule 2002(a)(2) requires at least 20 days notice by mail of a proposed sale of property of the estate other than in the ordinary course of business, unless the Court for cause shown shortens the time or directs another method of giving notice.

Rule 2002(c)(1) requires that the notice of a proposed sale include the time and place of any public sale, the terms and conditions of any private sale, and the time fixed for filing objections. It provides that the notice of sale or property is sufficient if it generally describes the property.

1 Rule 2002(I) requires that the notice be mailed to committees elected pursuant to 11
2 U.S.C. § 705.

3 Rule 2002(k) requires that the notice be given to the United States Trustee.

4 Rule 6004(c) provides that a motion for authority to sell property free and clear of liens
5 or other interests must be made in accordance with Rule 9014 and must be served on the parties
6 who have liens or other interests in the property to be sold.

7 Local Bankruptcy Rule 9013-1(1)(f) requires that a notice of motion and motion be
8 served at least 24 days before the hearing on the date specified in the notice.

9 In addition, Local Bankruptcy Rule 6004-2 requires that an additional copy of the notice
10 of a sale or of a motion to sell property of the estate be submitted to the Clerk of the Bankruptcy
11 Court with a document entitled "Notice of Sale of Estate Property" (Form 6004-2) at the time of
12 filing for purposes of publication.

13 The Debtor has complied with all of the above Code provisions and Rules. The Debtor
14 has complied with Rule 2002 because notice of this Motion and the overbid sale has been given to
15 the requisite parties, including the United States Trustee, the Committee, all creditors, all parties
16 who filed requests for special notice, and all parties in interest at least 24 days before the hearing
17 date. The notice of the Motion includes the time and place of the overbid sale and the time fixed
18 for filing objections. The Debtor has complied with Rule 6004(c) because the Notice and Motion
19 are being served upon the parties who have liens or interests in the Assets, and the Debtor has
20 complied with the requirements of Local Rule 6004-2 because the Debtor has filed a notice of the
21 proposed sale and Form 6004-2 with the Clerk of the Bankruptcy Court.

1 **2. The Sale Should Be Approved Because Good Business Reasons Exists to**
2 **Grant the Motion, the Purchase Price is Fair and Reasonable, and the Sale is in the**
3 **Best Interests of the Creditors and the Estate.**

4 As a general matter, a court hearing a motion to approve a sale under Section 363(b) of
5 the Bankruptcy Code should determine from the evidence presented before it that a "good business
6 reason" exists to grant such a motion. In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983). In
7 addition, the court must further find it is in the best interest of the estate. To make this
8 determination, the Court should consider whether:

- 9 (1) the sale is fair and reasonable, i.e., the price to be paid is adequate;
10 (2) the property has been given adequate marketing;
11 (3) the sale is in good faith, i.e., there is an absence of any lucrative deals with
12 insiders, and
13 (4) adequate notice has been provided to creditors.

14 In re Wilde Horse Enterprises, Inc., 136 B.R. 830, 841-2 (Bankr.C.D.Cal. 1991); In re The
15 Landing, 156 B.R. 246, 249 (Bankr.E.D.Mo. 1993); In re Mama's Original Foods, Inc., 234 B.R.
16 500, 502-505 (C.D.Cal. 1999, J. Bufford). The Debtor submits that the proposed sale of the
17 Assets free and clear of liens, claims, and interests, pursuant to the terms outlined above, satisfies
18 each of these requirements.

19 **a. Sound Business Purpose.**

20 The Ninth Circuit Bankruptcy Appellate Panel in Walter v. Sunwest Bank (In re Walter),
21 83 B.R. 14, 19 (9th Cir. B.A.P. 1988) has adopted a flexible case-by-case test to determine whether
22 the business purpose for a proposed sale justifies disposition of property of the estate under §
23 363(b).
24
25
26
27
28

1 The facts pertaining to the sale at issue here amply substantiate the Debtor's business
2 decision that the contemplated sale of the Assets serves the best interests of the estate's creditors
3 and merits the approval of this Court.
4

5 As discussed above, the Assets are of minimal value and the Debtor believes that it does
6 not make economic sense to relocate the Assets because the cost of relocation of more than 1,000
7 molds and miscellaneous equipment would outweigh its value. The proposed auction sale appears
8 to be the best way of maximizing the value of otherwise valueless assets. Seifert/Mariani have
9 agreed to submit an opening bid without any contingencies and without any obstacles to overbid,
10 which is consistent with the Debtor's goal to maximize the value of the estate for the benefit of all
11 creditors. The overbid opportunity will ensure that the final purchase price offered at the hearing
12 on Motion will be the highest and best price that could have been obtained for the Assets, which,
13 by definition, will dictate its fair market value.
14

15 **b. Fair and Reasonable Price.**

16 In order for a sale to be approved under § 363(b) of the Bankruptcy Code, the purchase
17 price must be fair and reasonable. *See generally, In re Canyon Partnership*, 55 B.R. 520 (Bankr.
18 S.D. Cal. 1985). The trustee (or debtor in possession) is given substantial discretion in this regard.
19 *Id.* In addition, courts have broad discretion with respect to matters under section 363(b). *See Big*
20 *Shanty Land Corp. v. Comer Properties, Inc.*, 61 B.R. 272, 278 (Bankr.N.D.Ga. 1985). In any sale
21 of estate assets, the ultimate purpose is to obtain the highest price for the property sold. *In re*
22 *Wilde Horse Enterprises, Inc.*, 136 B.R. at 841 (*citing In re Chung King, Inc.*, 753 F.2d 547 (7th
23 Cir. 1985)), *In re Alpha Industries, Inc.*, 84 B.R. 703, 705 (Bankr.Mont. 1988).
24

25 In this case, the Assets are of minimal value. The Debtor believes that it does not make
26 economic sense to hire a broker to market the Assets. Seifert/Mariani have made an initial offer of
27
28

1 \$25,000 for the purchase of the Assets. The sale is as is, where is, with no representations or
2 warranties, subject to Bankruptcy Court approval, and overbid. Moreover, the overbid opportunity
3 established by the Debtor will ensure that the final purchase price offered at the hearing on this
4 Motion will be the highest and best price that can be obtained for the Assets, which, by definition,
5 will dictate its fair market value.
6

7 **c. Adequate Marketing.**

8 As discussed, the Assets are of minimal value. The Debtor believes that it does not make
9 economic sense to hire a broker to market the Assets. Moreover, based on the custom nature of the
10 molds, the Debtor believes that there are no other suitors for the Assets. In order to ensure
11 maximum exposure for the auction, the Debtor has served notice of the hearing on the Motion
12 upon all creditors and parties in interest and has posted notice of the hearing with the Clerk of the
13 Bankruptcy Court. In light of the circumstances of this case, the Debtor believes that the
14 marketing is adequate.
15

16 **d. Good Faith.**

17 When a bankruptcy court authorizes a sale of assets pursuant to Section 363(b)(1), it is
18 required to make a finding with respect to the "good faith" of the purchaser. In re Abbotts Dairies,
19 supra, 788 F.2d at 149. Such a procedure ensures that Section 363(b)(1) will not be employed to
20 circumvent the creditor protections of Chapter 11, and as such, it mirrors the requirement of
21 Section 1129, that the Bankruptcy Court independently scrutinizes the debtor's reorganization plan
22 and makes a finding that it has been proposed in good faith. Id. at 150.
23

24 With respect to the Debtor's conduct in conjunction with the sale, the good faith
25 requirement focuses principally on whether there is any evidence of "fraud, collusion between the
26
27
28

1 purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other
2 bidders.” Abbotts Dairies, 788 F.2d at 147; Wilde Horse Enterprises, 136 B.R. at 842.

3
4 As discussed above, the Debtor has been in constant discussions with the Committee with
5 respect to the disposition of the Assets. The Debtor has filed this Motion with the Committee’s
6 support. There is no fraud or collusion involved in this transaction. The estate simply seeks to
7 dispose of certain assets which may bring a benefit to the creditors of the estate.

8 **e. Accurate and Reasonable Notice.**

9 The purpose of the notice is to provide an opportunity for objections and hearing before
10 the court if there are objections. In re Karpe, 84 B.R. 926, 930 (Bankr. M.D.Pa. 1988). A notice is
11 sufficient if it includes the terms and conditions of the sale and if it states the time for filing
12 objections. Id.

13
14 As set forth above, the Debtor has served notice of the date and time of the sale hearing
15 and the opportunity to overbid, and a copy of the Motion upon all of the Debtors’ creditors, the
16 Committee, the Office of the United States Trustee, and all other parties in interest. The Motion is
17 being heard on normal 24-days notice and the Debtor has filed the notices of the proposed sale
18 with the Clerk of the Bankruptcy Court, in accordance with the Local Bankruptcy Rules. Thus, the
19 Debtor submits that this notice procedure should be deemed adequate, accurate and reasonable by
20 the Court.
21

22 **3. The Sale of the Property Free and Clear of Liens is Proper Under 11 U.S.C.**
23 **§363(f).**

24 Bankruptcy Code §363(f) provides that the Debtor may sell property of the estate “free
25 and clear of any interest in such property” if:

- 26 (1) applicable non-bankruptcy law permits the sale of such
27 property free and clear of such interest; ...
28 (2) such entity consents;

- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. §363(f).

Because Bankruptcy Code §363(f) is in the disjunctive, the Debtor need only meet one of the five subsections of Section 363(f) in order to sell property free and clear of interests. In this case, at a minimum, subsections (2), (3) and (5) are applicable such that the Assets may be sold free and clear of liens, claims and interests, with the liens to attach to proceeds in the order of priority.

a. The Requirement of Section 363(b)(2) Has Been Satisfied.

Recently, Fremont assigned its secured claims to Seifert/Mariani. Seifert/Mariani have indicated that, as the first priority security interest holders, they consent to the sale free and clear of their newly assigned liens.

b. The Requirement of Section 363(b)(3) Has Been Satisfied.

As set forth above, the estimated face value of all of the encumbrances on the Assets substantially exceeds the proposed sale price of \$25,000.

There is a split of authority as to the requirement that the sales price must be "... greater than the aggregate value of all liens on such property" in Section 363(f)(3). Several courts have construed "value" to mean the face amount of the secured debt. Therefore, to satisfy Section 363(f)(3), the selling price would have to exceed the total face amount of the secured debt.¹

¹ See, e.g., Riverside Inv. Partnership, 674 F.2d 634, 640 (7th Cir. 1982)(case under the Bankruptcy Act); In re Terrace Chalet Apts., 159 B.R. 821 (N.D. Ill. 1993); In re Heine, 141 B.R. 185, 189 (Bankr. D.S.D. 1992).

1 On the other hand, a line of cases establishes that the meaning of "value" under Section
2 363(f)(3) has the same meaning as in Section 506(a), which deals with the valuation of secured
3 interests. These Courts have held that a valuation of liens conducted under Section 506(a) may be
4 used to determine the "aggregate value of all liens" under 11 U.S.C. Sec. 363(f)(3). In other
5 words, a sale should be approved where the proposed sales price exceeds the actual value of the
6 liens as measured under Section 506(a), and not the face amount of the secured debt. In re Collins,
7 180 B.R. 447 (Bankr. E.D. Va. 1995); In re Milford Group, Inc., 150 B.R. 904, 906 (Bankr. M.D.
8 Pa. 1992); In re Terrace Gardens Park Partnership, 96 B.R. 707 (Bankr. W.D. Tex. 1989); In re
9 Beker Industries Corp., 63 B.R. 474 (Bankr. S.D.N.Y. 1986); Matter of Rouse, 54 B.R. 31
10 (Bankr. W.D. Mo. 1985); In re Hatfield Homes, Inc., 30 B.R. 353 (Bankr. E.D. Pa. 1983). All of
11 these cases held that the measure of the value of liens under Section 363(f)(3) must be measured in
12 the context of Section 506(a).
13

14 The Debtor believes that this second line of cases is the better approach, for the reasons
15 explained immediately below.
16

17 First, the term "value" has been interpreted by the United States Supreme Court to have the
18 same meaning in Bankruptcy Code Sections 363(1) and (2) - relating to adequate protection - as in
19 Section 506(a).² The concept of adequate protection pervades the sale provisions of Section
20 363(f). As stated by one court:
21

22 "Sections 361 - 364 all address the treatment of secured claims in a
23 bankruptcy context. All four sections employ the common concept
24 of adequate protection as the touchstone for whether a Debtors'
25 proposed action should be approved. Adequate protection in turn
26 focuses on the value of the collateral securing the claim. So long
27 as a creditor's interest is adequately protected, the debtor is
28 permitted to sell property of the estate. 11 U.S.C. § 363(e). It

² United Savings Assoc. of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 108 S.Ct. 626, 630, 98 L.Ed.2d 740 (1988).

1 makes no sense to read into Section 363(f)(3) a restriction
2 inconsistent with the adequate protection scheme which pervades
3 both Section 363 and the rest of the Code, just because the sale is
4 free of liens, especially as the commonly accepted method of
5 adequately protecting a secured creditor when a sale is authorized
6 under Section 363(f) is to order the liens to attached to the
7 proceeds of the sale.”

8 In re Terrace Gardens Park Partnership, 96 B.R. at 713 (footnotes omitted).

9 Second, a secured creditor who disagrees with the proposed sale has recourse to Section
10 363(k), which permits such creditor to bid in its lien to block a sale. Id. Permitting a sale where
11 the secured creditors are adequately protected avoids the unfair situation where a creditor refuses
12 to consent to a sale which is otherwise beneficial to the estate. As stated in the Beker decision:

13 “[I]f a secured creditor does not desire to take the property for
14 itself and yet refuses to consent to a sale at less than the amount of
15 its lien, it is effectively insisting that others, including the debtor at
16 the expense of its own cash flow and of its general creditors,
17 continue to fund the property without a firm prospect for return.”

18 Beker, 63 B.R. at 478.

19 Third, the cases which utilize a valuation under Section 506(a) to permit a sale under
20 Section 363(f)(3) generally require that the Court look to the circumstances accompanying the sale
21 to determine whether to approve the sale. This offers further protection to secured creditors, while
22 permitting a sale which is in the best interests of the estate to proceed. These special
23 circumstances include, *inter alia*, whether the purchase price is the best obtainable,³ and most
24 importantly, whether the sale is in the best interests of the estate and its creditors.⁴ The facts of
25 this case show that the sale should be approved under 365(f)(3).

26
27 ³ Beker, 63 B.R. at 477.

28 ⁴ Collins, 180 B.R. at 451.

1 When determining the value of a lien under § 506(a), value is determined in light of the
2 valuation's purpose, and the proposed disposition of the property. Section 506(a) states in
3 pertinent part:
4

5 "An allowed claim of a creditor secured by a lien on property in
6 which the estate has an interest ... is a secured claim to the extent
7 of the value of such creditor's interest in the estate's interest in such
8 property. . . . Such value shall be determined in light of the
9 purpose of the valuation and of the proposed disposition or use of
such property. . . . Where there is an actual sale, such "is
conclusive evidence of the property's value."⁵

10 As stated by Collier on Bankruptcy:

11 "If an actual sale (or equivalent disposition) is to occur, the value
12 of the collateral should be based on the consideration to be
13 received by the estate in connection with the sale, provided that the
terms of the sale are fair and were arrived at on an arm's-length
basis."⁶

14 In this case, the Debtor is seeking approval of a bona fide sale already agreed to by the
15 parties which, in light of the circumstances of this case, reflects, what the Debtor believes to be,
16 the fair market value of the Assets. The public auction will conclusively determine the value of
17 the Assets for purposes of 11 U.S.C. § 506(a).
18

19 Although it is customary to hold a separate valuation hearing to determine the value of
20 liens under § 506(a), Courts have held that in the context of a Section 363(f) sale, there is no need
21 to hold a further valuation hearing which may unnecessarily delay the sale.⁷
22

23 ⁵ In re Alpine Group, 151 B.R. 931, 935 (9th Cir. BAP 1993); see also, Associates Commercial Corp. v. Rash, 520
24 U.S. 953, 960, 138 L.Ed.2d 148, 117 S.Ct. 1879, 1883 (1997) (amount of secured claim under § 506(a) "is the price
25 a willing buyer in the Debtors' trade, business, or situation would pay to obtain like property from a willing seller");
Ford Motor Credit v. Dobbins, 35 F.3d 860, 870 (4th Cir. 1994)(actual sales price determinative of value under
§ 506).

26 ⁶ 4 L. King, Collier on Bankruptcy, ¶ 506.03[6][b] at 506-40.

27 ⁷ Collins, supra, 180 B.R. at 452 n.7, citing In re Oneida Lake Development, 114 B.R. 352, 357 (Bankr. N.D.N.Y.
28 1990) ("[C]ourts have dispensed with evidentiary hearings in instances where such hearings would only serve to
significantly delay a sale of property and where the court finds that the price is the best that could be attained for the
property.")

1 Because the proposed purchase price and economic value of the sale equals or exceeds
2 the aggregate value of the liens on the Assets, the Debtor respectfully request that the Court
3 approve the sale, subject to overbid.
4

5 **c. The Requirement of Section 363(b)(5) Has Been Satisfied.**

6 In the event that the Court finds that the requirement of 363(f)(3) has not been
7 satisfied, the Court should still approve the sale of the Assets free and clear of liens, claims and
8 interests, because the requirement of Section 363(f)(5) has been met.

9 Many courts construe the language "money satisfaction of such interest" in § 363(f)(5) to
10 mean "a payment constituting *less than* full payment of the underlying debt." See, e.g., Healthco
11 International, Inc., 174 B.R. 174, 176 (Bankr.D.Mass. 1994); In re Grand Slam U.S.A., Inc., 178
12 B.R. 460, 462 (E.D.Mich. 1995); In re WBQ Partnership, 189 B.R. 97, 107 (Bankr.E.D.Va.
13 1995).⁸
14

15 There are several legal or equitable proceedings, through which the IRS *could* be forced
16 to accept less than the full payment of the debt that underlies their liens.^{9,10} Healthco, 174 B.R. at
17 176-177 (a motion to sell property filed by a Chapter 7 trustee was approved after the court found
18 that the mere hypothetical possibility of any of the following: a subsequent Chapter 11 plan
19 cramdown under 1129(b)(2)(A), subordination of tax liens under 724(b), or bifurcation of a claim
20 into secured and unsecured portions under 506(a), was sufficient to meet the requirement of §
21

22
23 ⁸ But see, In re Stroud Wholesale, Inc., 47 B.R. 999 (E.D.N.C. 1985) ("money satisfaction" as used in § 363(f)(5)
24 means "full satisfaction of creditors' interests in sales in liquidation of the estate, but does not mean full money
25 satisfaction in rehabilitation cases").

26 ⁹ A lien is separate from the interest that supports it. Folger Adam Security, Inc. v. Dematteis/MacGregor, JV, 209
27 F.3d 252, 259 (3rd Cir. 2000). All of the encumbrances against the Property are based on underlying interests.

28 ¹⁰ Section 363(f)(5) does not require that such a legal or equitable proceeding be initiated in advance of the filing of
a motion for approval of a § 363 sale, but only the possibility that such a legal or equitable proceeding *could* be
initiated at some point. Healthco, 174 B.R. at 176.

1 363(f)(5)); *accord*, In re Gulf States Steel, Inc. of Alabama, 285 B.R. 497, 508 (Bankr.N.D.Ala.
2 2002); King v. Board of Supervisors of Fairfax County (In re A.G. Van Metre, Jr., Inc.), 155 B.R.
3 118 (Bankr.E.D.Va. 1993)(§ 363(f)(5) may be used in conjunction with § 724(b), which allows for
4 the subordination and release of tax liens, to satisfy the requirements of 363(f) and allow the sale
5 of property free and clear of all liens even without the full satisfaction of the tax liens against the
6 property); James, 203 B.R. at 453 (possible existence of avoidance action against lienholder
7 satisfied § 363(f)(5)); In re Kenneth M. Wing, 63 B.R. 83, 85 (Bankr.M.D.Fla. 1986) (a sale free
8 and clear of liens, claims or interests may be appropriate under § 363(f)(5) if compelling equitable
9 reasons exist to warrant forcing creditors to accept less than full money satisfaction for their liens,
10 implying the court has the power to use its equitable powers to such an end); Grand Slam, 178
11 B.R. at 462 (equitable considerations allow the sale of over-encumbered property); Hatfield
12 Homes, 30 B.R. at 354 (if the proposed sale price is the best price obtainable under the
13 circumstances of a particular case, then the fact that junior lienholders may receive little or nothing
14 from the proceeds of the sale would not, standing alone, constitute reason for disapproving the
15 proposed sale).

16
17
18 As the case law cited above demonstrates that the County *could* be compelled to accept
19 less than the full payment of the debts that underlie its liens through the use of, among other
20 Bankruptcy Code sections, Sections 506(a),¹¹ 1129(b)(2)(A), 724(b) and 105, the Court should
21 determine that the requirements of Section 363(f)(5) have been met, and approve the sale of the
22 Assets free and clear of liens, claims and interests.
23
24
25

26
27
28 ¹¹ In Gulf States Steel, 285 B.R. at 513, the court explained why a Chapter 7 trustee's hypothetical reliance on
Section 363(b)(5) in conjunction with Section 506(d) would not constitute a "taking" in violation of the Fifth
Amendment of the U.S. Constitution or conflict with the United States Supreme Court's ruling in Dewsnup v.
Timm, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992).

1 Since the five conditions of Section 363(f) are disjunctive, the Assets may be sold if any
2 of the five conditions are satisfied. The Debtor submits that the requirements of Sections
3 363(f)(2), (f)(3) and/or (f)(5) are satisfied, and urges the Court to allow the sale of the Assets free
4 and clear of all liens, claims and interests, with such liens to attach to the proceeds with the same
5 force, extent, priority and validity as immediately before the sale.
6

7 **III.**

8 **CONCLUSION**

9 **WHEREFORE**, the Debtor respectfully requests that the Court enter an Order:

- 10 1. approving the Motion in its entirety;
- 11 2. authorizing the sale of the Assets free and clear of liens, claims and interests,
- 12 subject to overbid (as described herein), with all existing liens, claims and interests against the
- 13 Assets to transfer and attach to the proceeds of the sale with the same extent, priority and validity
- 14 as they had against the Assets;
- 15 3. establishing overbid procedures;
- 16 4. authorizing the Debtor to take all necessary and reasonable steps to consummate
- 17 the sale of the Assets; and
- 18 5. granting such other and further relief as the Court deems just and proper under the
- 19 circumstances.
- 20
- 21

22 Dated: September 27 2006

DURA ART STONE, INC., a California
corporation

By: _____

DAVID E. GOLUBCHIK

TODD M. ARNOLD

LEVENE, NEALE, BENDER, RANKIN
& BRILL L.L.P.

Attorneys for Debtor and
Debtor in Possession

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DECLARATION OF THOMAS D. SEIFERT

I, Thomas D. Seifert, hereby declare as follows:

1. I am the President of Dura Art Stone, Inc., a California corporation, the debtor and debtor in possession herein (the "Debtor"). I have personal knowledge of the facts set forth below and, if called to testify, I would and could competently testify thereto.

A. Background and Business Operations

2. The Debtor commenced its bankruptcy case by filing a voluntary petition under Chapter 11 of the Bankruptcy Code on June 21, 2005 (the "Petition Date"). The Debtor is operating its business and managing its financial affairs as a debtor in possession.

3. The Debtor is engaged in the business of designing and manufacturing architectural precast products including planters, bollards, trash receptacles, ash urns, treegrates, benches, tables, garden furniture, fountains, ornamental fixtures and perimeter security. The Debtor has a manufacturing facility in Fontana, California and Georgia. The Debtor also has administrative offices in Northern California.

4. For over 70 years, the Debtor has been an industry leader in the manufacture of cast stone and cast gypsum. From 1935, as Western Artificial Stone Company, then as Western Art Stone and now as Dura Art Stone, the Debtor has consistently been a pioneer in the development of improved materials, techniques and processes.

5. In addition to designing and manufacturing precast ornamental and site furnishings products, the Debtor was involved in the design and manufacture of precast building panels, which would be utilized in construction of buildings, many of which were hi-rises. Over time, construction-related costs, such as materials, insurance and equipment rentals increased while revenues remained relatively constant due to increased competition, resulting in substantially

1 lower profits for the Debtor. In its efforts to streamline operations, the Debtor scaled back its
2 panel business and ceased taking on new panel-related projects.

3
4 **B. Debtor's Financial Constraints**

5 6. By far, the Debtor's largest expenses in connection with its operations are labor-
6 related costs, and specifically, workers' compensation coverage. Prior to the bankruptcy filing, the
7 Debtor employed up to 100 personnel, including architects, engineers, designers, detailers,
8 manufacturers and administrative staff. In connection with management's efforts to reduce
9 expenses, we reduced the Debtor's staff to a core group of approximately 30 personnel, each of
10 which is integral to the Debtor's ability to maintain its operations and continue generating revenue.
11 Unfortunately, even though the Debtor's labor force was reduced by over 30%, insurance costs
12 almost doubled during the same period. I contacted the Debtor's insurance carriers to review the
13 records and conduct appropriate audits, but the response is that insurance costs continue to
14 escalate. By way of example, in October 2005, insurance costs comprised approximately 43% of
15 the Debtor's expenditures. As a result of such costs, the Debtor was forced to cease its operations
16 in Georgia. I recently received a notice from State Fund that the Debtor is required to post an
17 \$83,000 deposit for continuing worker's compensation coverage. I believe that the Debtor is
18 unable to operate a profitable business with such constraints.
19
20

21 **C. The Assets**

22 7. As a result of such costs, management was forced to cease the Debtor's active
23 operations in Georgia and rely on services of an independent subcontractor. We also determined
24 that it was not economically feasible to remove the personal property from Georgia and,
25 effectively, intended for the Debtor to abandon such property due to its minimal value. Such
26 personal property consists of more than 1,000 molds for the Debtor's products, as well as certain
27
28

1 miscellaneous equipment, which is identified in Exhibit "A" hereto (collectively, the "Assets").

2 The Assets do not include any leasehold improvements made by the Debtor at the Georgia
3 premises. Management has determined that the value of the Assets is minimal. In addition, once
4 the cost of relocation of such Assets is factored, I believe that the Assets have a negative value.
5

6 8. Through our respective counsel, the Official Committee of Unsecured Creditors
7 (the "Committee") and the Debtor have engaged in extensive discussions to determine how best to
8 administer this case, including the Assets. Currently, the Assets remain on real property owned by
9 my and Eugene Mariani's family trusts. Although we have cooperated with the estate and have
10 been storing the Assets at no charge to the estate, we are in the process of selling the real property
11 and will be unable to store the Assets for much longer.
12

13 **D. Proposed Auction Procedure**

14 9. Through extensive discussions with the Committee, we have determined that,
15 rather than abandoning the Assets, an attempt should be made to sell them for maximum value.
16 We have agreed to submit an initial bid in the amount of \$25,000 to purchase the Assets, subject to
17 overbid. The intent is to have an open auction in Court without any barriers to overbids, such as
18 breakup fees and other protections. The proposed terms of the auction sale are as follows:
19

- 20 a. The sale will include the physical Assets located in Georgia only.
- 21 b. The sale will not include any intellectual property of the Debtor.
- 22 c. Any party may overbid for the purchase of Assets at the time of the hearing on
23 the Motion. However, any such overbid should be on substantially the same
24 terms and conditions set forth herein.
- 25 d. In the event that a party wishes to overbid, the party should deposit with counsel
26 for the Debtor \$25,000 not later than 14 calendar days before the date of the
27
28

1 hearing, which shall be deemed to be a non-refundable deposit in the event that
2 the bidder is the successful overbidder at the hearing.

3
4 e. The only condition precedent for the sale to the successful bidder to close would
5 be for the Debtor to obtain an order from the Court approving the conveyance of
6 the Assets free and clear of all liens, claims and interests. There shall be no
7 other conditions or contingencies for the sale.

8 f. In the event that the successful bidder is a person or entity other than Mr.
9 Mariani and I, the successful bidder shall be responsible for removing all Assets
10 from the existing location within 10 days from the entry of the Court's order
11 approving the sale, so that we can complete the sale of the real property.
12

13 **E. Secured Claims**

14 10. Fremont Bank ("Fremont") holds a first priority security interest in substantially
15 all of the Debtor's assets, including the subject Assets, to secure an obligation due and owing to
16 Fremont in the amount of approximately \$3.6 million. Mr. Mariani and I have acquired Fremont's
17 secured debt.

18 11. In addition, I understand that the Clayton County Tax Commission ("County")
19 filed a proof of claim wherein the County asserts a secured claim in the amount of \$91,062.15
20 based on alleged personal property taxes. I am advised and understand that such taxes are based
21 on a percentage of value of the Debtor's assets. I believe that the value of the personal property
22 assets in Georgia is minimal. As a result, the Debtor disputes the secured claim and we intend to
23 file an objection thereto. In addition, the claim is based not only on the Assets which are the
24 subject of the proposed sale, but also leasehold improvements and other assets which are not part
25 of this sale.
26
27
28

1 F. The Debtor believes that the sale is in the best interest of the estate and should be
2 approved.

3
4 12 As discussed above, the Assets are of minimal value and I believe that it does not
5 make economic sense to relocate the Assets because the cost of relocation of more than 1,000
6 molds and miscellaneous equipment would outweigh their value. In my opinion, the proposed
7 auction sale appears to be the best way of maximizing the value of otherwise valueless assets. We
8 have agreed to submit an opening bid without any contingencies and without any obstacles to
9 overbid, which is consistent with the Debtor's goal to maximize the value of the estate for the
10 benefit of all creditors.

11
12 13 I believe that the overbid opportunity will ensure that the final purchase price
13 offered at the hearing on Motion will be the highest and best price that could have been obtained
14 for the Assets, which, by definition, will dictate its fair market value

15 14 Based on the foregoing, I respectfully request that the Court approve the Motion
16 and authorize the sale of the Assets to the highest bidder.

17 I declare under penalty of perjury under the laws of the United States of America that the
18 foregoing is true and correct to the best of my knowledge.

19 Executed on this 27 day of September 2006, at Fontana, California.

20
21 
22 THOMAS D. SEIFERT
23
24
25
26
27
28

Inventory of equipment remaining in Morrow

Band Saw

Conc. Mixer

Conc. Bucket

Cross Arm Saw

Cylinder Break Machine

Drill Press

Electric Compressor

Sand Blast Reclaimer

Seive Tester

Shear Mixer

Steel Band Saw

Table Saw

Table Scale

Test Machine

Grove Crane

Pettibone

Planer

Ingersoll Rand Compressor

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am an employee in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action; my business address is. 10250 Constellation Boulevard, Suite 1700, Los Angeles, California 90067.

On September 28, 2006, I served the foregoing document(s) described as:

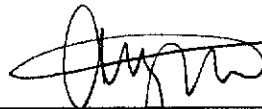
**NOTICE OF MOTION AND MOTION TO SELL CERTAIN PERSONAL
PROPERTY ASSETS OUTSIDE THE ORDINARY COURSE OF BUSINESS;
MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF
THOMAS D. SEIFERT IN SUPPORT THEREOF**

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

SEE ATTACHED SERVICE LIST

- ☒ (By Mail) I caused such envelope with postage thereon, fully prepaid to be placed in the United States mail. Executed on September 28, 2006 at Los Angeles, California.
- ☐ (By Federal Express/Overnight Mail) I caused such envelope to be delivered by Federal Express (or Express Mail), next business day delivery to the offices of the addressees. Executed on _____, 2006, at Los Angeles, California.
- ☐ (By Facsimile) I caused said document to be sent via facsimile to the offices of the addressee so designated on the attached list. Executed on _____, 2006, at Los Angeles, California.
- ☐ (By Personal service) I caused such envelope to be delivered by hand to the offices of the addressee. Executed on _____, 2006 at Los Angeles, California.

☒ (Federal) I declare under penalty of perjury pursuant to the laws of the United States of America that the foregoing is true and correct.



Angela Antonio

In re Dura Art Stone, Inc.
Case No. RS 05-16335-DN
RSN + Committee Members

Debtor's Counsel

David B. Golubchik
Levene, Neale, Bender, Rankin & Brill L.L.P.
10250 Cosntellation Boulevard, Suite 1700
Los Angeles, CA 90067

Debtor

Dura Art Stone, Inc.
Attn: Tom Seifert
11010 Live Oak Avenue
Fontana, CA 92337

U.S. Trustee – Riverside
3685 Main Street, Suite 300
Riverside, CA 92501

Committee

Gene Born, President
Borgen Heavy Equipment Repair, Inc.
13980 Rose Avenue
Fontana, CA 92337

Committee

David Scharf, Corporate Credit Manager
Composite One LLP
11917 Altamar Place
Santa Fe Springs, CA 90670

Committee

Richard T. Schick, CFO
Fabco Steel Fabrication, Inc.
P.O. Box 636
Alta Loma, CA 91701

Committee

Josephine Burns, President
Gap Architectural Products, Inc.
2255 Howard Drive
Winter Park, FL 32789

Committee

Michael Woods
Woods Site & Playscapes
P.O. Box 6
Elizabeth, CO 80107

Committee Counsel

Mark S. Horoupian
SulmeyerKupetz
333 S Hope St 35th Floor
Los Angeles, CA 90071-1406

Secured Creditor

Fremont Bank
Miekle Gledhill, Manager Special Assets
39550 Fremont Blvd.
Fremont, CA 94538

Fremont Bank
Chris Chenoweth, Esq.
39550 Fremont Blvd.
Fremont, CA 94538

Request for Special Notice

Robert Fontell
Litigation & Recovery Department
De Lage Landen Financial Services, Inc.
1111 Old Eagle School Road
Wayne, PA 19087

Counsel for Fremont Bank

Terrance L. Stinnett, Esq.
Goldberg, Stinnett, Meyers & Davis
44 Montgomery Street, Suite 2900
San Francisco, CA 94104

CA Field Ironworkers Pension Trust

c/o Yoshiyuki Takamatsu
Bailey & Associates
2029 Century Park East, Suite 3300
Los Angeles, CA 90067

Counsel for White Cap Construction

Supply, Inc.
William D. Schuster, Esq.
Allie & Schuster, P.C.
2122 N. Broadway
Santa Ana, CA 92706

United Electrical, Radio and Machine
Workers of America

Gabriel Yanez, President UE Local 1031
401 N. Gibbs Street, #302
Pomona, CA 91767

Counsel for Carpenters Sountwest
Administrative Corp. and Floyd Clay

Lee S. Feldman, Esq.
DeCarlo & Connor
533 S. Fremont Ave., 9th Floor
Los Angeles, CA 90071-1706

Authorized Agent for A&M Outdoor
Concepts, Inc.

Attn: Allan Roubush
4700 Sunbury Road
Galena, OH 43021

Secured Creditor

Clayton County Tax Commission
Courthouse Annex 3, 2nd Floor
121 S. McDonough St.
Jonesboro, Ga 30236